on behalf of a child of one of the drowned men *en ventre sa mere*. The court reserved leave to the child, *en ventre*, if born within due time, to prefer its claim for damages sustained by the death of its father. In the Australian case of *Manns* v. *Carlon*,[2] in which a widow claimed damages on behalf of herself and her unborn child, the trial was stayed until after the birth of the child. In *Hannam* v. *Wates Ltd. and Another*,[3] damages in the sum of £1,760 were awarded to an illegitimate child born six months after her father's death. The House of Lords decided in *Villar* v. *Gilbey*,[4] that a child *en ventre sa mere* is to be deemed born so far as necessary for the benefit of that unborn child. The English Court of Appeal, applying the rule in *Villar* v. *Gilbey*,[4] held in *Williams* v. *Ocean Coal Company, Limited*[5] that a posthumous child was a dependant of a deceased workman under the Workmen's Compensation Act, 1897.

The posthumous child, Paramesan, was accordingly entitled to compensation for his benefit as a dependant of the deceased and I considered an allowance of $20 per mensem for his support was fair and proper and not at all unreasonable.

Applying therefore the figures which as I have said were virtually agreed between the parties and which I approved as fair and reasonable in the circumstances together with the addition of $20 per mensem for the support of the posthumous child, that is to say, loss of support calculated at the rate of $120 per mensem on a purchase of 15 years, general damages amounted to $21,600. Counsel for the plaintiffs asked for interest at 6 per centum per annum on general damages. Counsel for the defendant initially submitted that interest could not be granted on damages and purported to rely on *Nasib Kaur & Another* v. *Cheah Kit & Another*[6] for that proposition, but when I referred him to the provisions of section 11 of the Civil Law Act, 1956 and the principles enunciated in *Jefford* v. *Gee*[7] which was approved and applied by the Federal Court in *Foong Nan* v. *Sagadevan*[8] he then conceded that interest could be awarded. I found this a proper case to award interest on general damages.

In the event I gave judgment for the plaintiffs for special damages as agreed in the sum of $200 and general damages in the sum of $21,600 and the costs of this action, and ordered that the sum of $21,600 be apportioned in the following manner:

1.	Widow (first plaintiff)	$10,000
2.	Kalithasan	2,500
3.	Anbarasu	2,500
4.	Thamilarasi	3,000
5.	Paramesan	3,600

I also awarded interest on the sum of $21,600 at the rate of 6 per centum per annum from the date of the service of the writ to be paid by the defendant to the first plaintiff and further ordered that the amounts due to the four infants to be paid to the Public Trustee to hold on trust until they attain the age of majority with liberty to apply.

Order accordingly.

Solicitors: *Yeoh Kian Teik & Co.; Khong & Son; Lim Ewe Hock.*

MARIASUSAI s/o SUMINADER v. NAM HONG TRADING CO. LTD. & ANOR.

[O.C.J. (Wan Suleiman F.J.) June 28, 1975]
[Seremban — Civil Suit No. 166 of 1970]

Negligence — Liability of employer — Whether injury occurred in the course of employment — Complete loss of vision of one eye — Quantum of damages — Common law liability.

Damages — Loss of vision of one eye — Quantum of damages.

While the plaintiff was milling rubber cuplumps on a machine some substance which came off the roller and which he thought was stone or sand flew into his left eye. As a result he lost vision in his left eye.

The plaintiff sued the first defendants who are the Nam Hong Rubber Factory for damages for the aforesaid injury. The second defendant was joined when the first defendants alleged in their defence that he, and not the first defendants, was the plaintiff's employer. The second defendant admitted that he had hired the plaintiff to work in the factory.

Held: (1) the second defendant was the plaintiff's employer as he had complete control over the hiring and dismissing of his labour force, including the plaintiff;

(2) the plaintiff's injury had been incurred during the course of his employment;

(3) the second defendant was fully liable at common law for negligence in not providing adequate safeguards;

(4) the plaintiff was awarded $15,000 damages for loss of sight in one eye and special damages of $253.20 plus interest.

Cases referred to:-

(1) *Hamzah D.494 & Ors.* v. *Wan Hanafi bin Wan Ali* [1975] 1 M.L.J. 203.

(2) *Jenny Yu & Anor.* v. *Pool & Anor.* [1967] 1 M.L.J. lxi.

(3) *Wee Kim Swee* v. *Cheong Aik Meng* [1964] M.L.J. lxxiii.

(4) *Peck Hock Ser* v. *Green Bus Company Ltd.* [1964] M.L.J. lxxiii.

(5) *Shamsudin* v. *Yap Choh Teh & Anor.* [1969] 1 M.L.J. 26.

CIVIL SUIT.

Khaw Yew Mei (Miss) for the plaintiff.

Atma Singh Gill for the first defendants.

Louis B. P. Cheah for the second defendant.

Wan Suleiman F.J.: The plaintiff, who was a rubber milling machine operator sued the first defendants who are the Nam Hong Rubber Factory, for damages for injuries to his left eye which he alleged was incurred during the course of employment. The second defendant was joined in when the first defendants alleged in their defence that he, and not first defendants was the plaintiff's employer.

In his pleadings second defendant denied that he was plaintiff's employer.

Therefore at the trial, the parties agreed that the following are the matters in issue:

(1) Was the plaintiff the employee of the first defendants or second defendant or both;

(2) Did he sustain the eye injury in the course of employment;

(3) Whether the accident causing injury was either caused or contributed to by negligence, breach of statutory duty or breach of implied agreement by first or second defendant; and

(4) Quantum of Damages.

The first issue was resolved when Tan Quek testified.

In examination-in-chief, he said that his workers shared profits, after certain deductions by him for himself, that workers formed different teams which would share the earnings for work done by their respective teams. He also said that it was only for E.P.F. and Insurance purposes that he claimed to be their employer. The E.P.F. returns D19A to F do not show how the monthly earnings of the workers were arrived at. Neither does the Employees' Wages Book Exhibit D21, which it should be noted commenced after the relevant period, from June 1, 1971, the second defendant claiming that his earlier records which would show the production by weight, per worker, had been destroyed by the floods of early 1971.

Mr. Cheah for second defendant suggests that the relationship between the latter and his workmen is not that of employer and employee, but is a "joint-venture". I suppose by that he means that this is a partnership. Section 195 of the Contract Ordinance, 1950 states that no contract for the remuneration of a servant engaged in any trade or undertaking by a share of the profits therefrom shall render such servant responsible as a partner nor would this give him the rights of a partner.

Second defendant admits that he has complete control over the hiring and dismissing of his labour force, including the plaintiff. In essence the effect of his testimony is that (1) that the plaintiff was under a duty of rendering personal service to him, and (2) he had the right to control plaintiff's work *i.e.* to tell him when to work and when not to do so, what work to do and how to do it so that the relationship of master and servant unquestionably exists. (See *Batt* on the Law of Master and Servant 5th Edition, page 8).

As regards the alleged profit sharing, the evidence seems to indicate the contrary. The E.P.F. returns, which do not include plaintiff's name because according to second defendant he worked for only short periods, show varying sums of monthly total earnings which do not seem to indicate equally shared profits even making allowances for variation in duration of work.

Then Exhibit P11 a return made by second defendant to the Labour Office stated that plaintiff's total earnings for September, October and November 1968 which coincided with plaintiff's assertion that he had worked for about 3 months about a year before the accident was $100 per month.

Plaintiff denied that he received a share of the profits but was in fact paid $4.20 per day; and I am inclined to believe him. Quite apart from the Exhibits put in by the defendant himself which belied the claim that remuneration took the form of profit sharing, the difficulties of calculating how much out of a constantly changing labour force earned for group work would make such a system impracticable.

In view of second defendant's admission that he had hired the plaintiff to work in the factory as his employee and not for first defendants, the answer to the first issue is therefore settled.

Did plaintiff sustain the eye injury during the course of employment?

According to plaintiff between 1.30 a.m. and 2.00 a.m. on March 6, 1969 whilst he was milling rubber cuplumps on a machine some substance which came off the roller and which he thought was stone or sand flew into his left eye. He felt severe pain. He then informed a Malay Kepala and the second defendant as well. He was asked to go home.

In the morning he informed the Manager, a person not in court, and was told to go to the General Hospital, Seremban. There a nurse attended to his eye and he was told to see the Eye Specialist the following day. On the 7th he saw the Eye Specialist, and remained in hospital for about 2 weeks.

Plaintiff claimed to have had normal vision before the accident. Whilst his right eye remained normal, there was complete loss of vision in his left eye after the accident.

Plaintiff also said that he had been a rubber tapper after which he became a motor car driver, before taking this milling job, and the various changes of employment had nothing to do with his failing eyesight. This item of evidence should be considered in due course when we examine the testimony of the two eye specialists who gave specific answers to questions by counsel for both the defendants who had suggested that the blindness in the left eye had nothing to do with an accident.

It is clear that the plaintiff believes that what had struck his eye was grit coming from the pebbles or stones tappers are known to put into latex (presumably into cups) to increase the weight of latex attributable to their work and therefore their income.

The first defendants concede that there was such malpractice during the Korean War when rubber prices were high but not at the time of the accident.

It is not denied that plaintiff worked without goggles or other eye protecting devices.

Dr. Hj. Mohamed Noor b. Marahakim, the first of the specialists called, recalled examining plaintiff on March 7, 1969. He confirmed that plaintiff was indeed blind in the left eye, and had normal vision in the other.

His medical report, Exhibit "A" stated that he had found Cataract with Glaucoma in plaintiff's left eye, which in his opinion could have been caused by being struck thereon by a piece of rubber, which was what plaintiff had told him had taken place.

In reply to the suggestion that the cataract found was due to normal old age, he explained that such cataract would either normally occur in both eyes or where one eye has cataract, the other eye would nor-

mally follow suit. Another reason for his conclusion that an accident caused the cataract was his observation that plaintiff's left eye was tearing away, red and painful, symptoms which would not accompany old age cataract.

The other specialist called, Dr. Pathmayogan, in both report (Exhibit P3A) and testimony concurred with the views of his colleague. He had examined plaintiff on October 18, 1972.

Tan Jit Tan, the Inspector of Machinery thinks that the rollers of these machines, which are run on a single line shaft, and the speed which cannot be varied though they can individually be stopped, is 30 revolutions per minute (r.p.m.'s). It therefore does not matter, speedwise, on which machine the plaintiff was working at the relevant time. The platform guards, on which much hearing time had been devoted are meant to keep operators at a safe distance from the rollers, the danger to be guarded against being that of preventing some part of the operator's anatomy being caught between the rollers. As against flying projectiles, therefore, it mattered little where the person was 1 from the rollers, as the plaintiff claimed he was when injured, or 4' therefrom, a distance which the presence of a platform guard would ensure.

The Malay Kepala to whom plaintiff said he reported the accident, before proceeding to report to second defendant himself must have been Selamat bin Bakar. Second defendant admits that Selamat was one of his four Kepalas during that period.

Selamat (DW3) however insisted that plaintiff had worked only up to 2.00 a.m. on the day in question and had then left the factory without reporting to any Kepala, as he should have done. Without reference to records, the witness was able to say that plaintiff had been working on machine No. 6, (plaintiff said he was on machine No. 2). When he noticed that there was no one at the machine after plaintiff's unannounced departure he had asked one Bujang to take over. Cross-examined by Miss Khaw for plaintiff, he conceded that he was unable to remember who had been on duty, and at which machines on 5th and 6th March 1969, and details of that nature.

But this strange facility of remembering what is of value to his side moves into the realms of falsehood with one glance at D19A, the E.P.F. Return for second defendant's employees. The only person called Bujang in the entire sheaf of returns D19(A-F) appears therein in respect of Bujang bin Osman of whom no E.P.F. contributions were made during the months of March, 1969, nor for the months of February, and April 1969. Bujang could not therefore be working on 5th or 6th March 1969, and taking into account all the evidence including his examination by the nurse for an eye injury on March 6 (Dr. Mohamed Noor explained how it could be that the eye department did not see plaintiff until 7th March) I must conclude that Tan Quek and Selamat had actively conspired to conceal the fact of plaintiff's immediate complaint of the mishap.

It therefore follows that I find that plaintiff's injury had been incurred during the course of his employment.

As regards the third issue the second defendant has himself conceded that first defendants provided the rubber for him (second defendant) to process up to the export stage. The first defendants, he added, also provided all the equipment, meaning the machinery, and so long as the second defendant provided first defendants with the finished product, the latter would not bother themselves as to the manner in which second defendant produced such product. Therefore it becomes clear that the safety of his employees is the sole responsibility of the second defendant.

Now the evidence of the Machinery Inspector that the rollers revolved at 30 revolutions per minute or one revolution every two seconds does not make the rollers something which revolve fast. However, we are told that scrap and cuplumps are fed into the rollers. According to the second defendant himself, after passing through the first machine *i.e.* macerator, lumps would be flattened but would not be in sheets. Only after the fourth machine would they become sheets.

It is common knowledge that rubber has elastic qualities so that when a person is pulling at rubber such as that passing through the rollers, whether such rubber has been turned into sheets or is merely assorted ribbons of rubber not yet turned into sheets, the possibilities are that particles from the rubber might whip back with more speed than the mere speed of the rollers, which probably happened in this case.

The eyes are, as Dr. Haji Mohamed Noor remarked, delicate, soft organs — easily injured. The second defendant himself admitted that cleaning the raw rubber would not remove lumps or bits of pebbles inside cuplumps.

It is true that the Inspector of Machinery had not insisted on safety devices other than those like the platform guard and the gear guards which are calculated to safeguard the limbs of machine operators. It is common ground that goggles or other devices to safeguard the ocular organs were not required by the Machinery Department nor were they provided by the second defendant.

In *Halsbury's* Laws of England 3rd Edition, Volume 28, pages 1 and 2 appears the following passage: —

"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case, and the categories of negligence are never closed. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all....",

and what is reasonable care appears on page 11 of the same volume which reads: —

In ordinary circumstances, or where simple operations are being performed, persons are not as a rule required to guard against every conceivable result of their actions, nor are they bound to exercise scientific care or to take extravagant precautions. They must have regard both to the probability of injury resulting, and to the probable seriousness of the injury.

They may weigh the cost and the difficulties of the precautions. They are in general entitled to assume that others will comply with statutory regulations...."

See also the Federal Court case of *Hamzah D.494 & Ors.* v. *Wan Hanafi bin Wan Ali.*(1)

Despite denials by the second defendant and his witnesses that they had ever heard of accidents of this particular sort taking place in rubber milling operations it seems to me that it is one of rather obvious dangers of such work. The provision of goggles or eye-guards of some sort does not appear to me an extravagant protection nor would it be expensive.

I therefore find that the second defendant is liable at common law for negligence in not providing adequate safeguards, and in the absence of evidence of contributory negligence by the plaintiff, I would hold him to be fully liable.

As regards damages for loss of an eye, I was referred to the case of *Jenny Yu & Anor.* v. *Pool & Anor.*(2) where the sum awarded was $18,000.

In *Wee Kim Swee* v. *Cheong Aik Meng,*(3) a Singapore award made in 1964 — $12,000 was awarded. There though there was only 80% loss of vision, the eye was likely to become worse. But, in addition to the eye injury there was also fracture of the infra orbital region.

In another Singapore award of 1962 — *Peck Hock Ser* v. *The Green Bus Co. Ltd.,*(4) $12,500 was awarded for injury to left eye whereby vision was limited to counting fingers at one metre only.

In 1968, Gill J. (as he then was) awarded $12,500 for loss of vision of one eye — *Shamsudin* v. *Yap Choh Teh & Anor.*(5)

Taking into account the depreciation in value of money since the last mentioned award, and the higher trend of the Singapore award, I feel that a sum of $15,000 for loss of sight in one eye is not over much, and I would accordingly award such sum, special damages (loss of earnings for 56 days at $4.20 per day — March 5, 1969 to April 29, 1969) *i.e.* $235.20, and interest on the aggregate sum from March 6, 1969 until date of realisation at 6% per annum. Plaintiff's costs to be paid by second defendant. First defendants' costs also to be paid by second defendant directly.

Order accordingly.

Solicitors: *Joseph & Son; Syarikat Atma Singh Gill & Gill; Shearn Delamore & Co.*

RE CHOE KUAN HIM, ADVOCATE & SOLICITOR; T. DAMODARAN v. CHOE KUAN HIM

[O.C.J. (Syed Agil Barakbah J.) July 14, 1975]
[Alor Star — Originating Summons No. 677 of 1974]

Practice and Procedure — Written undertaking by advocate and solicitor — Whether given by mistake — Advocates & Solicitors Ordinance, 1947.

Legal Profession — Advocate and solicitor — Written undertaking — Liability.

The applicant, a registered owner of several pieces of land, entered into a sale agreement with one Andavan who on March 6, 1974, assigned the said land to United Realty Sdn., Bhd., the purchaser. In the course of the transaction the respondent in his capacity as solicitor for the purchaser issued a written undertaking of the same date which was duly received by the applicant.

In the written undertaking the respondent undertook to release the balance of the purchase price to the applicant "upon the transfer of the said lands being duly registered....". On registration of the said lands, the respondent paid part of the purchase price to the applicant in cash and the balance thereof amounting to $182,000 in cheque. Payment of the said cheque was stopped by the respondent.

The issue for determination was whether the respondent was bound to pay the said sum of $182,000 on the strength of his written undertaking as a solicitor.

Held: (1) an undertaking given by a solicitor is very often the decisive factor in inducing its acceptance. Great care ought therefore to be paid to the wording of an undertaking both by the solicitor giving it and by the person accepting it;

(2) the fact that subsequent to the undertaking events occur which alter the position, such as his client withdrawing or changing his instructions before the undertaking has been honoured, will not entitle the solicitor to avoid liability unless he has expressly guarded against those events in the undertaking itself;

(3) the standard required is so high that the courts have allowed only one defence, that of mistake;

(4) as a solicitor, the respondent ought to have foreseen the consequences of such failure. He cannot turn back and say he was acting on the instructions of his client. He is the stakeholder and therefore bound by his undertaking;

(5) in the circumstances of this case in view of the fact that there was a pending civil action in which the applicant and the purchaser were involved, the respondent would be ordered to deposit the sum involved into court.

Cases referred to:-

(1) *Seah Choon Chye* v. *Saraswathy Devi* [1971] 1 M.L.J. 112, 113.

(2) *United Mining and Finance Corporation Ltd.* v. *Becher* [1910] 2 K.B. 296, 307.

(3) *Burrell* v. *Jones* (1819) 106 E.R. 580, 582.

ORIGINATING SUMMONS.

Wong Chong Wah for the applicant.

A. Jayadeva for the respondent.

Syed Agil Barakbah J.: This is an application by way of originating summons for an order that the respondent, a solicitor in the firm of Syarikat Choe, do forthwith pay the sum of $182,000 to the applicant pursuant to his written undertaking contained in a letter dated March 6, 1974, with interest at 12% per annum from April 16, 1974, till the date of payment and for costs occasioned by this application to be taxed.

After hearing in Chambers, I allowed the application and ordered the respondent to pay to the applicant forthwith the sum stated above as prayed with costs. However, an application was made for the adjournment of the matter into court for further argument under Order 54 rule 22A of the Rules of the Supreme Court. Mr. Wong Chong Wah appeared for the applicant and Mr. Jayadeva for the respondent. Further argument was heard in open court on March 9. 1975. An objection by Mr. Wong for the filing of further affidavit by the respondent was overruled by me on the ground that no fresh evidence was adduced but it explained matters referred to in the earlier affidavit with a view to giving a clearer picture of the issues involved to the court.